It’s the system, stupid!

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The title of *The Battle for International Law* evokes Rudolf von Jhering’s (“The Struggle / Battle for Law”). In this work, Jhering describes law as the product of struggle between conflicting interests and therefore as fundamentally enmeshed with politics. On the European continent, international lawyers generally see the idea of systematicity, especially in its Kelsenian variant, as being fundamentally opposed to Jhering’s conception of law. Mónica García-Salmones Rovira has shown masterfully that the aim of producing a science of law purged from morality and politics, despite rejecting the ‘political’ struggle of interests as part of legal science, paved the way for a particular political project with its own idea of a struggle of interests. This particular project included a movement from morality to economy and therefore to another vocabulary of necessity and incontestability. As Jochen von Bernstorff and Philipp Dann state in the Introduction, the volume at hand sets out to offer “new historical insights into the conditions, contingencies, and necessities of what led to [the world’s] current depressing and desolate state”. Legal and economic vocabularies working together to make the neoliberal model of world order seem inescapable certainly play a role in providing answers to this question. The idea of international law as a coherent legal system deserves more attention as part of these vocabularies.

One of the themes of the volume at hand consists in tracing how “the inherent conservative bias of law as ingrained social practice was used by Western actors to counter requested revolutionary innovations as incompatible with the ‘system’ or internal ‘coherence’ of a specific notion of ‘international law’” (p. 5–6). However, the volume does not dedicate a separate chapter to the notions of ‘system’, ‘coherence’, or ‘order’ as conceptual weapons (‘*Kampfbegriffe*’, as the subtitle to the respective part of the volume reads). This contribution traces the instances in which *The Battle for International Law* evokes these notions and links some of the book’s themes to a critical reading of German international law scholarship.

The “legal” and “political” divide

Across the battlefield that is international law, the Global North’s strategy of the second half of the 20th century stands out: invoking a firm boundary between the ‘legal’ and the ‘political’. The Global South’s claims have consistently been labelled as ‘political’ and the attempts at reasserting the North’s dominance as strictly ‘legal’. The concepts of ‘system’, ‘order’, and ‘coherence’ have been crucial elements of the weaponry that the North has deployed as part of this strategy. It may strike some international lawyers – especially those trained on the European continent – as odd to speak of the notions of ‘system’, ‘order’, and ‘coherence’ as conceptual weapons. These notions constitute the foundations on which their belief in the rationality, objectivity, and neutrality of international law rests. For lawyers trained in Germany, Austria, and Switzerland in particular, *Systemdenken* is just the way we were trained to think about law. Martti Koskenniemi identified *Systemdenken* as one of the main

themes in the German heritage in international legal thought from the 17th century to the present. Engaging with the notions of 'system', 'coherence', or 'order' as conceptual weapons in the battle for international law, therefore, means engaging with the positions of German(-speaking) international legal scholars.

In 1976, i.e. toward the end of the period the volume on *The Battle for International Law* covers, the journal ZaöRV dedicated a special issue on the occasion of the 50th anniversary of the Max Planck Institute for Comparative Public Law and International Law (MPIL) in Heidelberg to the topic of 'International Law as Legal Order'. As Hermann Mosler and Rudolf Bernhardt state in the preface to this special issue, the topic was a reference to the very first article published in the same journal in 1929. In this inaugural article, Viktor Bruns, the first director of the *Kaiser-Wilhelm-Institut* in Berlin, set the academic standard and defined the method that should guide the newly founded institute. Bruns characterised international law as a legal order for the community of states, a system of legal principles, institutions, and rules, which are interconnected and constitute an ordered arrangement. As Felix Lange pointed out in his account of German international legal scholarship, the method of systematisation, prevalent both within the *Kaiser-Wilhelm-Institut* and the renamed MPIL, served the purpose of keeping a distance from politics and of focusing on the practice of international law. Lange portrays the method of systematization as the alternative to which the members of the Institute resorted who did not wish to participate in providing legal justifications for Nazi politics. Accordingly, systematisation was less discredited after World War II and was therefore the means of choice for the MPIL to regain the international scholarly community's trust.

It is in this spirit of trying to remain 'neutral', of offering 'legal' rather than 'political' analysis that German international lawyers in the 1950s to 1970s were complicit in reproducing and upholding the exclusion of the Third World from having a say in determining what counts as international law.

Take it or leave it – Coherence, system, and the story of statehood in the battle for international law

The seemingly innocuous description of international law as a legal system played a crucial role in countering claims of the Third World amidst and immediately after formal decolonization. In her chapter on 'Acquired Rights and State Succession', Anne Brunner draws attention to one way in which the idea of the systematicity of international law – the idea that its rules and principles are interconnected and necessarily form a whole – was employed to counter the claims of the newly independent states to start their existence with a clean slate regarding obligations under customary international law. As an example of how international lawyers deployed this argumentative tactic, Brunner cites D.P. O'Connell, who argued that "[n]ew states can hardly claim the privileges and faculties of states and yet repudiate the system from which these derive" and that "a state, when it comes into existence as a state, does so in a structural context which gains its form from law". The cited argument is particularly hypocritical: it reflects the way in which actors in the Global South often found themselves trapped in the colonial logic of international law once they engaged in international law arguments to support their claims. As Sundhya Pahuja has pointed out, the people in the Global South did not exactly

choose to seek independence from colonial rule in the form of sovereign states. The juristic monopoly, which international law held before decolonization, meant that international law provided 'a structure by which the heterogeneous movements for decolonisation could be smoothed into a coherent story', namely the story of sovereign statehood. Framing the struggle for independence in the language of sovereignty and statehood was simply the only option available under international law. O'Connell's argument therefore reflects a pernicious line of argument, which may be simplified as follows: You want independence? Fine, we can offer you independence only as states. You want to have a say in what your obligations are? Sorry, you should not have chosen to be a state then.

The North as the guardian of 'proper' system-building: the battle over customary international law

The notions of system, order, and coherence played a decisive role in labelling Third World attempts at reshaping sources doctrine as 'political' and opposing them to purportedly neutral and 'legal' arguments, which just happened to preserve Western dominance. As Jochen von Bernstorff notes in his chapter on 'The Battle for Recognition of Wars of National Liberation', "[m]any Western governments and international lawyers from the mid-1960s onwards attempted to delegitimize all those UN organs as 'politicized' that – with the new Asian/ African majority – adopted documents that were not in line with their political agenda".

Antony Anghie and Bhupinder S. Chimni, in their article on TWAIL methodology – notoriously excluded from the famous AJIL symposium on methods in international law – highlighted Third World states' attempts at formulating a new approach to sources doctrine. The UN General Assembly was at the heart of this new approach. The aim was to create a more democratic and participatory international legal system. As Anghie and Chimni describe it, the attempts "were often defeated by positivist arguments regarding sources and consent".

An illustrative example is Christian Tomuschat's contribution to the 1976 special issue of the ZaöRV mentioned above. Tomuschat's contribution is devoted to the legally binding force of the Charter of the Economic Rights and Duties of States (CERDS, UNGA Res 3281 [XXIX]) and of UNGA resolutions in general. Employing a technique David Kennedy has described as characteristic of 'mainstream' international law, Tomuschat frames his position as a 'reasonable middle ground' between two extreme positions. On one side of the extremes, Tomuschat situates the position of international legal scholars from the Third World, including Obed Asamoah and R.P. Anand, who presented arguments for lowering the threshold for creating customary law through UNGA resolutions. On the other side of the extremes, Tomuschat distances himself from what he calls a 'strictly traditionalist' conception of the law – without, however, specifying what such strict traditionalism might entail and how his position differs from it.

Tomuschat arrives at a position situated between these extremes. UNGA resolutions may be legally binding – or at least exert a kind of authority that compels international lawyers to consult the resolution – if what the states consented to in adopting the resolution is supposed to be a systematic compilation of the rules

covering an area of international law. Systematicity thus acts as the litmus test for the legal validity of a document. This standard of systematicity requires both the substance of the document and the process that led to its adoption to fit in with the body of international rules established before formal decolonization – and therefore without participation by the Third World.

By adopting this 'middle ground' position described above, Tomuschat intends to halt a 'virulent' process of 'erosion' (p. 467) and to counter a growing tendency to 'politicize' the debate on the legal status of UNGA resolutions (p. 476). In describing the role of the Group of 77 (G77) in the UN General Assembly, the tone of the article shifts and the language is hardly reconcilable with the position of a purportedly neutral observer. Tomuschat sees the process that led to the adoption of the CERDS as an illustration of complete domination of the G77 in the General Assembly ("*wie total die Gruppe der 77 die Szenerie beherrscht*", p. 488). The mere possibility of adopting resolutions in a manner that Tomuschat describes as 'steamrolling' precludes, in his opinion, the recognition of the General Assembly as a legislative body. This steamrolling, in his account, presents a stark contrast to the cautious ("*behutsam*") approach to international law-making, which the International Law Commission (ILC) displays (p. 449). Tomuschat drives his point home by invoking the spectre of a tyrannic world government subduing the world using an overwhelming majority. This, he goes on, would amount to a death sentence for some states, while the UN would not be able effectively to protect life and limb of these imperilled states' populations (p. 489). Note that European lawyers did not display a similar horror in the face of majority rule when it came to the ILC or the International Court of Justice (ICJ).

Conclusions for current battles

The examples in this short piece offer a glimpse into how Western international lawyers have invoked the idea of international law as a coherent legal system to defer responsibility for their positions on substance to 'the structure' or 'the system'. These examples are an invitation for European lawyers to question the idea of *Systemdenken* as the pinnacle of a detached and unpolitical 'legal science'. Reflecting on our own position is a prerequisite for performing the roles of an international lawyer responsibly amidst current battles.
